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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MM Docket No. 99-331
	)	
Amendment of Section 73.202(b)	)	RM-9848
Table of Allotments	)	
FM Broadcast Stations	)	
(Madisonville, and	)	
College Station, Texas)	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Assistant Chief,
Audio Division
Media Bureau

PETITION FOR RECONSIDERATION

Respectfully submitted,

GARWOOD BROADCASTING COMPANY OF TEXAS

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February 20, 2003

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I N D E X

SUMMARY

This case involves the allotment and use of FM radio channels in the South Texas area. On January 10, 2000, Garwood Broadcasting Company of Texas filed a Petition for Rulemaking which would inter alia make use of channel 273C1, a channel requested for use by Sandlin Broadcasting Company for its station KMKS in Bay City, Texas, in 1991. Although the FCC granted the allotment and a subsequent Sandlin application for construction permit on the channel, Sandlin then allowed the application to lapse and has not used channel 273C1 for the past 12 years, while it has operated all that time on channel 273C2. In its petition, Garwood offered an equivalent channel 259C2 to replace the 273C2 on which Sandlin was operating. The FCC denied Garwood's petition, suggesting that the substitution was not sufficient and that Sandlin should have yet another chance to make some use of the C1 channel. In so doing, the Commission made an error of fact as to an Amendment filed by Garwood, and its decision was based upon cases not only not standing for the proposition, but also pre-dating Acts of Congress dealing with unused frequencies which Garwood submits should be controlling. Since the Commission's action in its Report and Order was unfounded, factually flawed, and diametrically opposed to the expressed intent of Congress on the matter, the Report and Order should be vacated and reversed and the Garwood Petition adopted.

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PETITION FOR RECONSIDERATION

On January 21, 2003, the Chief of the Audio Division of the Mass Media Bureau issued a Report and Order in this Docket which denied the Rulemaking Petition of Garwood Broadcasting Company of Texas (hereinafter "Garwood") that had been filed on January 10, 2000, and which had been published by the Commission in Public Notice (Report No. 2402) as released on April 11, 2000.

For the reasons set forth herein, Garwood respectfully submits that the Report and Order was in error, unsupported by the cases cited by the Commission, contrary to the clearly expressed intent of Congress as applicable and controlling on the matters under consideration here, and contrary to the public interest. For these reasons, as more fully set forth below, Garwood herewith submits its request for reconsideration of that Report and Order, pursuant to 47 CFR 1.429 of the Commission's rules, and requests that the Report and Order be reversed and vacated and the Garwood Petition adopted. In support whereof, the following is submitted:

I. STATEMENT OF THE CASE

This case involves the allotment and use of FM radio channels in the South Texas area. In its petition, Garwood proposed, inter alia, relocating channel 273C1 as presently allotted to Bay City Texas, where it is occupied by radio station KMKS, licensed to Sandlin Broadcasting Company, Inc. (hereinafter **"Sandlin")** and actually operating on channel 273C2, to a reallocation to operate as channel 273C1 in Columbus, Texas, with the license of KULM in Columbus modified from its present 252A to its new operation on a fully spaced channel 273C1. 1/ Garwood's proposal was opposed by Sandlin on the grounds that, despite the fact that Sandlin had occupied the 273C1 allotment for well over ten years but never used it, instead operating during all of that time on the lower 273C2 channel (for which Garwood had proposed an equivalent replacement channel 259C2 in its petition) Sandlin wished to continue its control over the use of channel 273C1 for possible future use by Sandlin.

Garwood argued that Sandlin had warehoused and wasted the 273C1 frequency for far longer than could be deemed reasonable under any legal or equitable analyses and that its opposition should not now be allowed to reward its past actions and continue that waste of frequency. Since the Commission held in its **Report** and Order (hereinafter "Order") that Sandlin should get at least one more chance to make some use of that channel and denied the

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1/ Under the proposal, KULM's present channel 252A would be reallotted as a first service and upgraded to operate as channel 252C3 in Sheridan, Texas.

otherwise legally sufficient Garwood Petition on that basis, it is necessary to now give some further consideration to the history of Sandlin's stewardship of channel 273C1.

II. SANDLIN HAS ALREADY RENEGED ON THREE COMMITMENTS TO THE COMMISSION TO MAKE USE OF CHANEL 273C1 *AND* HAS SIMPLY WAREHOUSED THE CHANNEL FOR ITS OWN CONVENIENCE FOR OVER 12 YEARS

Sandlin is the licensee of KMKS in Bay City and originally operated on channel 221A until 1986 when it requested and received FCC permission to change and upgrade its channel of operation to 273C2 where it has continued to operate for over the past 15 years. It was operating on channel 273C2 when, in 1991, it filed a Rulemaking Petition requesting that the channel be further upgraded to 273C1 with the affirmative representation required in such requests that, upon approval of the upgraded channel by the FCC, that Sandlin would then apply for, build, and operate its station upon that upgraded channel. 2/ Relying upon such representations by Sandlin, the Commission proceeded on November 7, 1991, to issue its Report and Order in Docket 91-242 (DA-1412) granting Sandlin's request to upgrade the channel from 273C2 to 273C1, modifying Sandlin's license for KMKS to operate on that upgraded channel, and directing Sandlin to file its "perfecting" application form 301 to complete the process and reflect the new higher classification.

2/ It should be noted and recognized here that absent such a specific commitment, the FCC will absolutely NOT consider, let alone grant such a rulemaking proposal. See e.g. Murray, Kentucky, 3 FCC Rcd 3016 (1988), and Pine, Arkansas, 3 FCC RCD 1010 (1988).

In response to the FCC's action in granting the upgrade, Sandlin did in fact proceed to file a form 301 application specifying operation on the higher channel, again representing it would build a station on that upgraded channel, but the application was so deficient that it was held to be unacceptable under FCC rules and was returned as defective and unacceptable for filing (FCC Letter to Sandlin August 12, 1992, copy attached hereto in Exhibit 1). In response to the dismissal of its first application, Sandlin filed a second application on February 10, 1993, to reflect modification and use of channel 273C1 on KMKS, once again representing it would build a station on that upgraded channel, and this application was granted (construction permit issued May 12, 1993, copy attached hereto in Exhibit 1).

Having now committed to make use of channel 273C1 not once, not twice, but three times, and the Commission relying upon such commitments not once but three times in granting the rulemaking petition and the application for use of the channel, Sandlin then simply put its newly acquired prize away 'in a box' to use on some other day if and when it was ever deemed to be in Sandlin's private interest to do so. It never again bothered to correspond with the Commission as to the newly granted channel or the newly granted construction permit. The time for completion of the construction permit came and went with no request for extension, no explanation for any "delay", no anything. Such being the case, the FCC by letter dated January 12, 1995, (copy attached hereto in Exhibit 1) finally took note of Sandlin's failure to build its

construction permit on channel 273C1 and canceled the construction permit.

From that time through the present, Sandlin has simply continued to warehouse channel 273C1, not making any use of it itself, but blocking its use by anyone else for any other purpose, and during all that time blocking its use to provide any service to the public. It stood that way, unused and totally wasted for close to TEN YEARS when Garwood filed its petition for rulemaking on January 10, 2000. It has to be further noted that when Garwood filed its petition, there still was no application on file by Sandlin proposing any use whatsoever of channel 273C1 and that Sandlin had in fact by then operated its station KMKS for over ten years in Bay City on channel 273C2, apparently believing that operation was all that was required to properly serve its licensed community. In recognition of that fact, Garwood proposed replacement channel 259C2 as fully equivalent to Sandlin's longtime **de facto** operation in Bay City on channel 273C2.

Even after Garwood filed its petition, and while Sandlin bitterly opposed grant of that petition, Sandlin **still** did not proceed to file any application proposing its own use of channel 273C1, and the channel continued into its 11th and 12th year of "storage" by Sandlin.

111. SUMMARY OF ARGUMENT

In its Order the Commission denied the Garwood proposal and, in effect, decided to give Sandlin 'another chance' to make use of the channel it had held unused for twelve years, confiding that "In the event Sandlin Broadcasting does not activate Channel 273C1 at Bay City as represented in this proceeding, we would consider a proposal to downgrade Station KMKS to specify operation on a class C2 channel". (Report at paragraph 6).

Garwood submits that there must come a time, there must be some outer limit on misuse and nonuse of radio spectrum assigned by the Commission. And there must also be a limit on how many times representations may be made to the Commission for the Commission's reliance and then simply ignored and left unfulfilled, as if they never existed. In the present case, Sandlin's representation in seeking allotment of the upgraded channel was broken (strike one): its representation in filing its first application was broken (strike two): its representation in filing its second application was broken (strike three): it then held the channel hostage and unused for ten years unbuilt and with no further interest expressed as of the time that Garwood filed its Petition (strike four): and even then it continued to hold the channel unbuilt and unapplied for for the next three years while this proceeding was pending (strike five).

Where is the limit of forbearance on this? Would this not seem to already be more **"chances"** than anyone should have a right to expect? Does there not come a time where it is patently

unreasonable and contrary to the public interest to allow someone with a track record such as Sandlin's in this case to continue to pile new "promises" atop the existing pile of old ones? Garwood submits that Sandlin is already far beyond any reasonable point where it should expect or receive any more "one more chances" from the Federal Communications Commission.

Beyond that general observation as to the error of rewarding Sandlin for its past conduct in warehousing this channel, Garwood submits that the FCC's Order is infected by serious factual error in its failure to consider an Amendment filed by Garwood (which would have changed Garwood's proposal for channel 273 in Columbus from a C1 to an "A" channel use, that the Commission's conclusions are not supported by the cases cited by the Commission, and, of the utmost importance, that the action by the Commission that, in effect not only "forgives" but actually rewards Sandlin for wasting channel 273C1 for 12 years and blocking its use to anyone else to provide a broadcast service on that channel, is diametrically opposed to, and in irrefutable conflict with, the clearly stated intent of the Congress as it relates to the warehousing and wasting of valuable frequency allocations.

Moreover, to the extent that Sandlin did in fact file an application for use of Channel 273C1 subsequent to release of the Order (on February 6, 2003), it is submitted that no weight should be given to that 11th hour (or more accurately, "12th year") maneuver, since it does not erase the 12 years of

unexplained wasting and warehousing of the channel by Sandlin, it proposes a short-spaced operation of the channel, and most amazingly, the application is identical to the one filed by Sandlin in **1993**, approved by the FCC at that time, with a construction permit issued, which was then totally ignored by Sandlin and revoked by the Commission.

As previously noted, Sandlin never requested an extension or offered one word of explanation as to why the prior construction permit was never built and has not done ***so*** to this date. Sandlin simply let it lapse and be revoked. Amazingly, Sandlin has the courage to actually refer to this unbuilt and dismissed construction permit in the first paragraph of its new application, almost as if that were a "plus" of some kind. We suggest otherwise and submit that Sandlin should be judged on its miserable track record in this case before the FCC. It has wasted a channel, it has wasted the Commission's time and resources, and it has repeatedly failed to honor commitments made to the Commission for the Commission's reliance. In view of that, it deserves no "further chances" and no credit to the representations it may now make. Been there, done that.

Lastly, it is noted that since Sandlin has now seen fit to "reveal" its latest 'intent' to build a short-spaced station on channel 273C1 at its present site, it is obvious that its newly expressed desires could be accommodated just as well by replacing

273C1 with the same operation at the same site on 259C1. 3/ All that is required to do *so* is to make a minor engineering change in an existing station in Halletsville, Texas, which is also owned by the same principal as Garwood, and which he has agreed to do, See Exhibit 2). *So*, if the Commission still wishes to accommodate Sandlin's newly expressed wishes, it could do *so* while still adopting the Garwood proposal and achieving the additional service that would result therefrom.

IV. ARGUMENT

A. The Commission's Failure to Consider the Amendment filed by Garwood Was Based Upon an Error of Fact,

We would start off here by recognizing some basic truths: The Amendment to Counterproposal filed by Garwood on January 11, 2002, was not a matter of "right" and was recognized as such, closing with a recitation of the public interest basis for considering the pleading and a specific request for permission that the pleading "be accepted and considered". This is not a request that would be included in any pleading filed as a "matter of right" where it is obviously unnecessary to request that the pleading "be accepted and considered".

In many cases of larger pleadings a separate "Motion for Leave to File" may be filed. In many other cases however, especially where it is a small pleading, the request for

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3/ Had Sandlin revealed earlier in this proceeding that it intended a C1 operation under 73.215 at its present site, Garwood could have, and would have, made this suggestion then. Sandlin's intention to operate a short-spaced C1 was not revealed until its latest filing on February 6, 3003, subsequent to release of the Report and Order.

permission to have the pleading accepted and considered is often included as a part of the pleading itself, in some cases even as a footnote in the pleading. For example, attached hereto as Exhibit 3 is a 4 page "Statement For the Record", a pleading admittedly outside those allowed of right under 1.415(a), filed by the law firm of Shook, Hardy & Bacon, a large and very reputable firm dealing on a regular basis with the FCC and obviously well aware of FCC practices and procedures, which included its request for acceptance and consideration of the pleading as a footnote (footnote 1) within the pleading as filed. Nor is this unique. It is in fact a common practice followed by numerous communications law firms and the Commission's files are full of similar such requests.

Reference to rule 1.415(d) in fact says only that **"no** additional comments may be filed unless specifically requested or **authorized by the Commission.** In order to get "authorized" you obviously have to ask for **"permission"** but the rule does not indicate any exclusive manner in which to ask such permission and in its footnote 7 denying consideration of the Garwood Amendment because it "...was not accompanied by a [separate] Motion to Accept..." the Commission cited no rule or authority for that action.

In the instant case, the subject pleading was only three pages long and it included a statement of good cause as well as a recognition that it was not a pleading of **"right"** and a request for permission to have it accepted and considered. That was

consistent with Rule 1.415(d) and although we recognize it is filed not as a matter of right but at the sufferance of the Commission and might be denied on THAT basis, it was error to deny it on the claim that it did not contain a request for permission as required by 1.415(d) since it clearly did and it was error for the Commission to claim otherwise.

As to the substance of the pleading, it should also be noted that the reason for the filing in the first place was to seek to "simplify" the Garwood proposal in the hopes that it might be acted upon by the Commission. In this respect it should be recognized that the Garwood proposal had been filed on January 10, 2000, and had languished there for over two years with no action. The Amendment was filed in the hopes that reducing the channel request in Columbus from 273C1 to 273A might result in some action on the proposal. It is also noted that Sandlin filed lengthy Comments in response to the Amendment on February 13, 2002, but that it did <u>not</u> object to the acceptance or consideration of the Amendment as requested by Garwood.

In sum, Garwood submits that the Amendment recognized that it was not a pleading "of right" and needed permission to be accepted and considered and that such request for the pleading to be "accepted and considered" was specifically included in the Amendment as filed in full accordance with FCC Rule 1.415(d) and that it was error for the Commission to deny consideration or acceptance of the Amendment based upon its erroneous finding that such permission had not been requested. As a pleading filed at

the sufferance of the Commission, the Commission still had the power to deny such permission if it felt there was insufficient public interest basis to accept and consider it. Since it might have indeed "simplified" the proceeding, was not burdensome, and had not been opposed by Sandlin, Garwood would have hoped that the public interest basis for accepting and considering the Amendment had been established. In any event, it should have been determined on that basis and not upon the wholly erroneous suggestion that the authorization needed under 1.415(d) had not been sought.

B. The Prior Cases Relied Upon by the Commission as a Basis for Its Action Do not Support That Action.

In its Report the Commission recognized that the Garwood proposal, including its original request for a fully-spaced allocation of channel 273C1 at Columbus, was consistent with all FCC Rules and Regulations (paragraph 5 of the Report) but then, in paragraph 6 proceeds to deny adoption of the Garwood proposal, in favor of giving Sandlin 'one more chance' to make use of the channel relying there upon an alleged policy "not to downgrade a station to accommodate another station's desire to upgrade". 4/

Moreover, in support of this "policy" the Commission cited three cases, none of which support its position. The first case

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4/ Two points should be noted at the outset: First, The Garwood proposal was a lot more than a simple suggestion to "upgrade" one station (among other things, it offered two new first radio services, a class A to Garwood and a Class C3 to Sheridan) and secondly, in even reaching application of this "policy" the Commission had to first rely upon its erroneous failure to even consider the public interest basis for acceptance and consideration of the Garwood Amendment which reduced the channel allocation at Columbus from C1 to A.

was Shingle Springs and Quincy, California, 7 FCC Rcd 3113 (M.M. Bur 1992) which involved two stations in agreement to a downgrade at one station to their mutual benefit. This case had nothing to do or say as to the question presented here. Similarly with the second case, Flora and Kings, Mississippi and Newellton, uisiana, 7 FCC Rcd 5477 (M.M. Bur 1992) which is of even less relevance since it only involved a station seeking an adjacent channel upgrade which did not even include any question of a "downgrade" of any other station.

The third case was Billings and Lewistown, Montana, 6 FCC Rcd 3632 (M.M. Bur. 1991) that involved a station seeking to totally remove and reallot a television channel being used in another town as a satellite service. The case involved a television station, and it involved removal of what was apparently the sole allocation to Lewiston for use as an additional allocation to Billings. It also involved another fact that SHOULD be relevant here but was not mentioned or relied upon in the instant case. In Billings, the Commission placed substantial reliance for its decision not to grant the reallotment upon the fact that the Lewistown licensee had reacted to the petition to remove the channel by filing an application to use it as a full service channel in Lewistown. This application was on file at the time of the Billings Decision and the commitment was relied upon by the Commission in maintaining the channel as the sole service in Lewistown.

To state the obvious, there was no proposal here to **"remove"** the existing service from Bay City, only to switch it to another channel fully equivalent to the one on which the station had operated for over ten years. Also, unlike the Billings case, there was no application filed by Sandlin in response to the Petition, none on file by Sandlin at the time of the instant Decision, and none had been filed during the over the more than THREE Years the case had been pending. Finally, there was no indication in the Billings case of an aggravated negative past history of prior representations as to channel use made and then ignored as we have in the instant case.

In sum, if the cases stand for anything, we submit that they stand for grant of the Garwood proposal and denial of any "further chances" to be given to Sandlin to make any use of the allocation it has warehoused for over twelve years. Finally, there is one more element to consider as to these cases cited by the FCC and it is a most important element at that. Whatever latitude and forbearance the FCC may have had for the warehousing and wasting of spectrum space in 1991 when Sandlin made its first empty promise to make use of channel 273C1 upon allocation by the Commission, things have changed quite a bit since then.

C. The Commission's Action is Directly Contrary to the Intent of Congress as it relates to Use, Abuse, and Wasting of Spectrum Space.

It is noted that the dates of all three cases cited by the Commission are all in either 1991 or 1992. It is also noted that in October of 1992, new legislation by the U.S. Congress was

approved (The National Telecommunications and Information ration Organization Act;, 47 USC 901 et. seq.) which for the first time reflected the serious and growing concern of the Congress as to the allocation and use of scarce spectrum space and its concern that such space be efficiently utilized and not wasted. The continuing concern of the Congress on this point was reflected in further legislation in August of 1993, which amended this Act by adding new Sections 921 and 927, and in August of 1997 where the matters of Identification, reallocation, and recovery of unused or ill-used spectrum space was again the matter of congressional scrutiny and concern. One thing that was, and remains, obvious from this legislation is the substantial concern of the Congress as to the efficient and proper use of the spectrum in the public interest. It is inconceivable that the Congress would "approve" the egregious and documented warehousing of channel 273C1 by Sandlin during the past 12 years or the rewarding of Sandlin with yet "another chance" as proposed by the Commission in its Order.

That, however is not all. Just in case there was any lingering doubt at all as to the sense and intent of the Congress on this matter, we need only look to its action in the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat.56, @ Section 403(l) (1996). In that Act the Congress treated many diverse subjects but, relative to the matter before us now and the question of how much forbearance should be accorded by the FCC to cases of documented and aggravated waste of spectrum space, we need only look to Section 403(l). The original Senate

Bill was S.652 and included (at Section 302(b)(5)) a subsection that would provide for automatic cancellation of a broadcaster's license if the station did not transmit a signal for 12 consecutive months. While the original House version of the Bill had no such corresponding provision in its original form, there was no dissent and no reluctance among the House conferees in completely accepting and embracing the Senate provision (See Conference Report on S.652, Telecommunications Act of 1996 (House of Representatives, January 31, 1996), and adopting it as final language in the Act.

As then passed and enacted into law, the sense and intent of the Congress on this matter could not be clearer and it translates to "use it or lose it". While the specific legislative provision related to licensees who did not use their assigned frequency for one year, it is inconceivable to believe that the Congress would not have a similar if not **more** profound objection to a licensee such as Sandlin which requested a high powered channel allocation, then reneged on its promise to use that frequency and then simply sat on it for over twelve years, unused and blocked from use by any other party to provide service to the public. Sandlin is the poster child of warehoused frequencies and with its sorry track record of broken promises and wasted spectrum should not be rewarded with further chances to make more promises. Given the strong, if not drastic, language used by the Congress as to licensees off the air and not using their assigned frequencies for **one** year there can be no real question as to what the intent of Congress was on this question or what action it

would expect from the Commission in a case like Sandlin's where it has warehoused and wasted a channel frequency for 12 years.

In this respect it is also relevant to note that in implementing the terms of Section 403(l) of the Telecommunications Act of 1996, the Commission itself made specific reference not only to the specific words of the statute but also to the "Congressional Intent" of the statute (see **Silent** Order, 11 FCC Rcd 16599 (1996)). Nor can there be any question **as** to the requirement that the Commission take note of Congressional intent and avoid the adoption of rules or adjudication that would be clearly in conflict with such Congressional intent. It is beyond dispute that the Commission must act within the framework of the Congressional Acts which created it and which govern its operation. That being ***so***, to the extent that congressional intent may be clearly seen, as here, the Commission may not ignore that intent and undertake actions by adjudication or by rule that would be contrary to such clear congressional intent. SEC v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575 (1947); Omnipoint v. FCC, 78 F.3rd 620, U..S. App D.C. Cir (1996); Chisolm et al V. FCC et **al**, 538 F. 2nd 349, U.S. App, D.C Cir.,(1976), Cert den. 429 U.S. 890 (1976):

In fact, in the instant case, had Sandlin honored its original commitments to the Commission in first securing the allocation of channel 273C1 and then in applying for and receiving a construction permit for that channel, it would have built a station on channel 273C1 in 1993. Had it done ***so*** and THEN

gone off the air for more than one year, the channel would have been taken from Sandlin automatically by operation of law, and there would be no question as to that. Here we have the anomalous situation of Sandlin NOT honoring its commitment to use the channel as requested, keeping that channel "off the air" for not just one year but TWELVE years and then being actually "rewarded" for its malfeasance by receiving yet "another chance" to use the channel. That is simply incomprehensible and egregiously in conflict with the policy of spectrum use reflected in the congressional legislation. As such, we respectfully submit that the decision in favor of continued control and dominion over the channel by Sandlin is flatly contrary to clear congressional intent as to the use of radio spectrum space and should be reversed on that basis.

D. A Decision in Favor of Sandlin is contrary to the Public Interest in Identifying and Using Warehoused Channels.

In the above section we noted that the Commission's action in favor of continued control of channel 273C1 to Sandlin was in direct conflict with the will of Congress against continued authorizations to those who did not use them. There is, in addition, another related consideration which is also ill-served by the FCC Decision. Garwood in this case searched the FCC database and undertook its own engineering studies which identified the wasted channel 273C1 held hostage by Sandlin and proposed full use of that frequency in its overall rulemaking proposal. Indeed, the Garwood proposal, and all the good that it would do in providing new FM radio services to several

communities, was dependent upon use of channel 273C1. Recognizing that Sandlin had only provided a C2 service on that channel for over 10 years, with the implicit understanding and assumption that Sandlin believed such C2 service was indeed adequate and in the public interest of its licensed community of Bay City, Garwood believed it more than reasonable to provide an equivalent replacement service to that actual longtime operation and propose channel 259C2 to replace the actual de facto operation on 273C2 by Sandlin. As noted, at the time of the Garwood petition and for three years thereafter, there was no application filed or pending by Sandlin for use of the C1 facility.

That being the case, the C2 substitution seemed more than reasonable, since it would change nothing as far as existing service by Sandlin to its community of license was concerned, and it would facilitate the various new services proposed by Garwood. As such, it seemed more than reasonable and undoubtedly in the public interest. To the extent that Sandlin claims a continued private interest in the channel allocation it had not used for over ten years and the fact that the Commission seemed to agree with that position in its Decision, the precedent set by that decision would effectively stop and foreclose any other prospective petitioner from similarly identifying and seeking to use wasted and warehoused channels. It would obviously be a waste of time to do so if the result would be the 'one more chance' approach used by the Commission in a case as flagrantly outrageous as the instant case.

To the extent that Petitioners such as Garwood identify wasted channels and seek to put them to use, they serve the general public interest in the role of "private attorney generals" in implementing and enforcing a clear congressional mandate against wasted and warehoused spectrum space. See **Davis** Administrative **Law**, Section 22.05. If the Decision in this case is allowed to stand, it would stand as a bar to anyone else seeking to identify and propose use of wasted and warehoused spectrum space and would simply serve to propagate aggravated abuse cases such as Sandlin's which are contrary to the will of Congress, contrary to the public's right to use and service from the limited radio spectrum, and contrary to common sense.

V. ADDITIONAL CONSIDERATIONS RESULTING FROM SANDLIN'S POST-DECISION APPLICATION.

As is clear from the above discussion, Garwood does not believe that, given Sandlin's past failures to comply with its own promises and representations to the Commission as well as the protracted number of years in which it has simply sat upon the unused channel 273C1 allocation, depriving anyone and everyone else of its use, Sandlin should be given any further considerations or 'chances' on anything, and it certainly should be given no further dominion over channel 273C1. Nonetheless, to the extent that the Commission may for some reason still wish to accommodate Sandlin, there is still a way it could do *so* while at the same time adopting the Garwood proposal and the various new public interest services it would provide.

As noted above, Sandlin on February 6, 2003, refiled its application (which had been originally filed on April 7, 1992, refiled on February 10, 1993, granted by the FCC on May 12, 1993, and then abandoned without explanation by Sandlin with the c.p. finally revoked and canceled by action of the FCC January 12, 1995) again proposing use of channel 273C1 as a short-spaced operation (under FCC Rule 73.215) at its present transmitter site 5/

Having now disclosed its renewed plan to operate channel 273C1 as a short-spaced channel at its existing site, 6/ it is clear that it is now possible to replace 273C1 with 259C1 to be operated on the same short-spaced basis at that same site. As documented in the attached Engineering Statement (Exhibit 4) all that would be required to make that work is for station KTXM(FM) at Halletsville, Texas, also owned by the principal of Garwood, to make a minor reduction in power and or site location and the licensee of KTXM(FM) at Halletsville hereby makes that commitment

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5/ We cannot help but note here that in the original Garwood Petition as filed, Garwood proposed the allocation of channel 273C1 at Columbus as a fully=spaced operation there, and if so allocated by the Commission, Garwood would build it as such. At the same time, if the Commission believed that allocation at Columbus should be as 273A, Garwood would accept and build that.

6/ It is noted here that if Sandlin had ever previously stated its intention to operate as a short-spaced C1 station under FCC Rule 73.215, from its existing site, Garwood could have, and would have, earlier proposed the channel 259C1 substitute discussed herein. To the extent that Sandlin did not reveal its stated intention until after the decision in this case was released, it is a new relevant fact affecting the case and properly raised and discussed by Garwood here. Warmack Communications, MM Docket 83-1223,3 FCC Rcd 2526, (1986).

(See Exhibit 2). Recognizing that, the allocation at Bay City may be changed to 259C1, an upgrade for Sandlin beyond the 273C2 presently licensed there, and also fully equivalent to the 273C1 now proposed by Sandlin in its current manifestation of its application form 301. In adopting this approach, the Commission, should it choose to do **so**, could fully accommodate Sandlin's freshly stated intention to build a short-spaced C1 station at Bay City, while also adopting the Garwood proposal that would, inter alia, provide a new first service to the cities of Garwood and Sheridan, Texas. 7/

VI. CONCLUSION

In sum, Garwood submits that the Comm ssion's **Report and Order** in this case is seriously flawed and should be reversed. It erroneously denied consideration of Garwood's request to file and have accepted and considered its Amendment filed January 11,2002; the cases cited for the action taken in favor of Sandlin do not support that action and all pre-date applicable Acts of Congress which would govern the issue presented; the action by the Commission in favor of Sandlin effectively rewards Sandlin for not building the station that it promised to build in 1993, and for doing nothing while blocking use of channel 273C1 for twelve

7/ It is also noted here that modification of the Commission's backfill procedures have been recently indicated in Pacific Broadcasting of **Missouri**, FCC 03-18, (2003), but it is assumed that such new procedures are not meant to apply retroactively to cases such as the instant one which have been on file for over three years and now on review, and would be applied only on a prospective basis to new cases as they are filed, with no application to the instant proceeding.

years, all in direct conflict with the unmistakable intent of congress in not continuing any such radio broadcast authorizations that are unused, warehoused, and wasted by their holders, and contrary to the public interest in encouraging prospective Petitioners, such as Garwood, in identifying wasted and warehoused radio frequencies, and proposing active uses for them in the public interest. For all these reasons, Garwood submits that the Commission should reconsider its Report and Order and find in favor of the Garwood proposal. As an alternative, should the Commission for some reason still feel inclined to accommodate Sandlin, it is suggested that it replace channel 273C1 at Bay City with 259C1 in accordance with the application refiled by Sandlin subsequent to release of the Report and Order on February 6, 2003, then reallocate channel 273C1 (or 273A if the Commission *so* chooses, Garwood is committed to build either) to Columbus and adopt the Garwood proposal.

Respectfully submitted,

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February *20*, 2003